Universal Trustee (M) Bhd v Lambang Pertama Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-623–10 OF 2013
WONG KIAN KHEONG JC
16 JULY 2014

Civil Procedure — Stay of proceedings — Application for — Application to stay hearing of striking out application — Jurisdiction of court — Special circumstances to justify stay — Heavier burden in stay of proceedings compared to stay of execution — Whether appeal would be rendered academic — Whether prejudice caused by granting stay — Courts of Judicature Act 1964 s 73 — Rules of the Court of Appeal 1994 r 13

In this suit, the plaintiff claimed for recovery of outstanding sums in respect of loan stocks issued by the first defendant and guaranteed by the second defendant. The first and second defendants' counterclaim alleged various matters against the plaintiff. The plaintiff's application for summary judgment was allowed by the court. However, the court ordered a stay of execution of the summary judgment pending disposal of the counterclaim. The plaintiff then applied to strike out the counterclaim whilst the defendants appealed to the Court of Appeal against the summary judgment (the defendants' appeal). Before the plaintiff's striking out application could be heard, the defendants filed this application to stay the hearing of the plaintiff's striking out application pending disposal of the defendants' appeal (the defendants' stay application).

Held, dismissing the defendants' stay application with costs:

(1) Section 73 of the Courts of Judicature Act 1964 and r 13 of the Rules of the Court of Appeal 1994 provide the statutory jurisdiction for the High Court and Court of Appeal to stay execution of any order or judgment and proceedings pending disposal of an appeal to the Court of Appeal. Stay of execution and stay of proceedings pending appeal to Court of Appeal should be the exception and not the norm. As there are clear statutory provisions conferring an exceptional jurisdiction on the High Court and Court of Appeal to stay execution and to stay proceedings pending appeal to the Court of Appeal, there is no need to resort to the court's inherent jurisdiction (see paras 11–13 & 15–16).

(2) Case law does not distinguish stay of execution from stay of proceedings. Case law requires both the applicants for stay of execution and stay of proceedings to show 'special circumstances' to justify a stay. An applicant

for a stay of proceedings should bear a heavier burden vis a vis an applicant for a stay of execution. This is because an application to stay proceedings will hinder an expeditious disposal of a suit (see paras 21–22).

(3) The court was unable to accede to the defendants' stay application because the defendants' appeal would not be rendered academic even if the court did not stay the plaintiff's striking out application. The defendants had not discharged their legal burden to show any special circumstance to justify the defendants' stay application. Further, there was no prejudice to the defendants if the court refused the defendants' stay application because there was already a stay of summary judgment pending the disposal of the counterclaim (see para 28).

[Bahasa Malaysia summary

Dalam tindakan ini, plaintif menuntut untuk mendapatkan balik jumlah yang belum dijelaskan berkaitan stok pinjaman yang dikeluarkan oleh defendan pertama dan dijamin oleh defendan kedua. Tuntutan balas defendan kedua mendakwa pelbagai perkara terhadap plaintif. Permohonan plaintif untuk penghakiman ringkas dibenarkan oleh mahkamah. Walau bagaimanapun, mahkamah memerintahkan penangguhan pelaksanaan penghakiman ringkas sementara menunggu pendengaran tuntutan balas. Plaintif kemudiannya memohon untuk membatalkan tuntutan balas sementara defendan-defendan merayu kepada Mahkamah Rayuan terhadap penghakiman ringkas (rayuan defendan-defendan). Sebelum permohonan pembatalan plaintif boleh didengar, defendan-defendan memfailkan permohonan ini untuk menangguhkan pendengaran permohonan pembatalan plaintif sementara menunggu pendengaran rayuan defendan-defendan (permohonan penangguhan defendan-defendan).

Diputuskan, menolak permohonan penangguhan defendan-defendan dengan kos:

(1) Seksyen 73 Akta Mahkamah Kehakiman 1964 dan k 13 Kaedah-Kaedah Mahkamah Rayuan 1994 memperuntukkan bidang kuasa statutori untuk Mahkamah Tinggi dan Mahkamah Rayuan untuk menangguhkan pelaksanaan apa-apa perintah atau penghakiman dan prosiding sementara menunggu pendengaran rayuan ke Mahkamah Rayuan. Penangguhan pelaksanaan dan penangguhan prosiding sementara menunggu rayuan ke Mahkamah Rayuan patut menjadi pengecualian dan tidak norma. Memandangkan terdapat peruntukan-peruntukan statutori yang jelas memberikan bidang kuasa luar biasa kepada Mahkamah Tinggi dan Mahkamah Rayuan untuk menangguhkan pelaksanaan dan menangguhkan prosiding sementara menunggu rayuan kepada Mahkamah Rayuan, tidak perlu untuk mengguna pakai bidang kuasa mahkamah yang sedia ada (lihat perenggan 11–13 & 15–16).

(2) Kes undang-undang tidak membezakan penangguhan pelaksanaan daripada penangguhan prosiding. Kes undang-undang memerlukan kedua-dua pemohon untuk penangguhan pelaksanaan dan penangguhan prosiding untuk menunjukkan 'special circumstances' untuk menjustifikasikan penangguhan. Pemohon untuk penangguhan prosiding sepatutnya menanggung beban lebih berat vis a vis seorang pemohon untuk penangguhan pelaksanaan. Ini adalah kerana permohonan untuk penangguhan prosiding akan menghalang penyelesaian cepat sesuatu tindakan (lihat perenggan 21–22).

(3) Mahkamah tidak dapat bersetuju kepada permohonan penangguhan defendan-defendan kerana rayuan defendan-defendan tidak akan dijadikan akademik walaupun mahkamah tidak menangguhkan permohonan pembatalan plaintif. Defendan-defendan tidak melepaskan beban undang-undang mereka untuk menunjukkan apa-apa keadaan khas untuk menjustifikasikan permohonan penangguhan defendan-defendan. Selanjutnya, tidak ada prejudis kepada defendan-defendan jika mahkamah menolak permohonan penangguhan defendan-defendan kerana telah terdapat penangguhan penghakiman ringkas sementara menunggu pendengaran tuntutan balas (lihat perenggan 28).]

Notes

For cases on application for stay of proceedings, see 2(4) *Mallal's Digest* (2014 Reissue) paras 8112–8158.

Cases referred to

Chinese Chamber Realty Pte Ltd and others v Samsung Corp (No 2) [2003] 4 SLR 313, HC (refd)

Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris [2014] 9 MLJ 605, HC (refd)

Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213; [2013] 3 CLJ 47, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd [2002] 3 SLR 312, HC (refd)

MCAT Gen Sdn Bhd v Celcom (Malaysia) Bhd (Part 2) [2007] 8 MLJ 107; [2007] 10 CLJ 375, HC (refd)

MCI Worldcom Asia Pte Ltd v Chembell Technology Sdn Bhd [2003] 4 SLR 748, HC (refd)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (refd)

Structural Concrete Sdn Bhd v Wing Tiek Holdings Bhd & Ors [1997] 1 MLJ 581; [1997] 1 CLJ 300, CA (refd)

Universal Trustee (Malaysia) Berhad v Lambang Pertama Sdn Bhd & Anor [2014] 3 MLRH 681, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 67(1), 73
Rules of Court 2012 O 32 r 13(2)(a), (b), (c), O 34
Rules of the Court of Appeal 1994 r 13
Senior Courts Act 1981 [UK] s 49(3)
Supreme Court of Judicature Act (Cap 322) [SG] s 41(1)
Supreme Court Act 1981 [UK] s 49(3)

Kong Chia Yee (Shook Lin & Bok) for the plaintiff.
Mohaji bin Selamat (Noor Hazury bin Mohd Zubir with him) (Mohaji, Hazury & Ismail) for the defendants.

Wong Kian Kheong JC:

(THE DEFENDANTS' APPLICATION TO STAY THE PLAINTIFF'S STRIKING OUT APPLICATION)

BACKGROUND

[1] This suit was filed by the plaintiff on behalf of AmBank (M) Bhd ('AmBank') on 24 October 2013.

[2] In this suit, the plaintiff claimed for recovery of outstanding sums in respect of Redeemable Secured Loan Stocks-A ('the RSLS-A') issued by the first defendant and guaranteed by the second defendant.

[3] RSLS-A should had been redeemed by the first defendant on the second extended maturity date of 19 May 2009.

[4] In this suit, the first and second defendants ('the defendants') filed their defence and counterclaim against the plaintiff ('the counterclaim'). The counterclaim alleged various matters against the plaintiff and AmBank.

[5] The plaintiff filed an application for summary judgment against the defendants which was allowed by this court (Nallini Pathmanathan J, reported in *Universal Trustee (Malaysia) Berhad v Lambang Pertama Sdn Bhd & Anor* [2014] 3 MLRH 681) on 25 March 2014 ('the summary judgment'). Nallini Pathmanathan J however ordered a stay of execution of the summary judgment pending the disposal of the counterclaim ('the stay of summary judgment').

[6] The plaintiff filed its application to strike out the counterclaim ('the plaintiff's striking out application') on 10 April 2014.

[7] On 17 April 2014 the defendants appealed to the Court of Appeal against the summary judgment ('the defendants' appeal').

[8] The hearing of the plaintiff's striking out application was scheduled to be heard on 17 June 2014. However, on 10 June 2014, the defendants filed this application to stay the hearing of the plaintiff's striking out application pending disposal of the defendants' appeal ('the defendants' stay application').

WHICH APPLICATION TO BE HEARD FIRST

[9] On 4 July 2014, the plaintiff's striking out application and the defendants' stay application came before me.

[10] I decided to hear the defendants' stay application before disposing of the plaintiff's striking out application. This is because if I hear the plaintiff's striking out application first, this will render redundant the defendants' stay application. The plaintiff's learned counsel, Ms Kong Chia Yee, to her credit, did not object to the disposal of the defendants' stay application before hearing the plaintiff's striking out application.

THE COURT'S JURISDICTION TO STAY PROCEEDINGS

[11] Section 73 of the Courts of Judicature Act 1964 ('the CJA') provides as follows:

> *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders* and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.
>
> (Emphasis added.)

[12] Rule 13 of the Rules of the Court of Appeal 1994 states:

> *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders* and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.
>
> (Emphasis added.)

[13] The above two statutory provisions ('the two statutory provisions'), in my view, provide the statutory jurisdiction for the High Court and Court of Appeal to stay:

(a) execution of any order or judgment; and

(b) proceedings,

— pending disposal of an appeal to the Court of Appeal.

[14] The wording of the two statutory provisions indicate that the general rule is that an appeal to the Court of Appeal does not stay:

(a) execution of an order or judgment which is the subject matter of the appeal; and

(b) proceedings in the High Court.

[15] In view of the wording of the two statutory provisions, stay of execution and stay of proceedings pending appeal to Court of Appeal should be the exception and not the norm. If otherwise, the opening words in the two statutory provisions (*appeal shall not operate as a stay of execution or of proceedings*) will be undermined, if not rendered redundant.

[16] As there are clear statutory provisions conferring an exceptional jurisdiction on the High Court and Court of Appeal to stay execution and to stay proceedings pending appeal to the Court of Appeal, there is no need to resort to the court's inherent jurisdiction — Federal Court's judgment in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307, at p 320.

[17] Section 49(3) of the then named Supreme Court Act 1981 (applicable to England and Wales) (SCA) provides as follows:

> Nothing in ('the SCA') shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person, whether or not a party to the proceedings.

[18] SCA is now renamed the Senior Courts Act 1981 (to avoid confusion as the Supreme Court in England and Wales has replaced the House of Lords).

[19] It is clear that s 49(3) of the SCA is different from the two statutory provisions. Hence, it is my view that English cases on stay of proceedings, should be read with caution.

[20] As provided in the two statutory provisions, whether a court grants a stay of execution or a stay of proceedings is an exercise of judicial discretion dependent on the particular facts adduced in that court. Accordingly, judgments on these matters are purely illustrative and have no binding effect. The Court of Appeal held in *Structural Concrete Sdn Bhd v Wing Tiek Holdings*

Bhd & Ors [1997] 1 MLJ 581 at p 586; [1997] 1 CLJ 300, at p 306:

> Exercises of judicial discretion are not judicial precedent because they are only authority for the facts of the particular case

WHEN PROCEEDINGS CAN BE STAYED PENDING DISPOSAL OF APPEAL?

[21] Case law does not distinguish stay of execution from stay of proceedings. Case law requires both the applicants for stay of execution and stay of proceedings to show 'special circumstances' to justify a stay.

[22] I am of the view that an applicant for a stay of proceedings should bear a heavier burden vis a vis an applicant for a stay of execution. This is because an application to stay proceedings will hinder an expeditious disposal of a suit as decided by the following cases:

(a) the Court of Appeal held in *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd* [2013] 4 MLJ 213 at p 222; [2013] 3 CLJ 47, at p 58, as follows:

> It is important to stress that initiation of a suit in a court of law demands the suit will be heard expeditiously and completed without any inhibition midway. Therefore, *where an application for stay of proceedings is intended to merely stop or suspend the proceedings, it will be refused*. Some applicants, on seeing the weakness of their client's case, would resort to application for stay and thereby waste the time of the other party and the court. The party simply cannot resort to the interlocutory of stay proceedings on having the slightest disagreement with any ruling of a trial judge. Courts are enjoined not to encourage such unwholesome practice.

(Emphasis added.); and

(b) in *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2002] 3 SLR 312, at para 17, the Singapore High Court stated that if every interlocutory order is appealed against and a stay of proceedings is sought:

> The litigation process would become most unsatisfactory if all such interlocutory applications must first receive the attention of the highest court in our system of justice before the next step could be taken.

Singapore cases on stay of proceedings are persuasive as s 41(1) of the Singapore's Supreme Court of Judicature Act is in pari materia with the two statutory provisions.

[23] In deciding whether proceedings can be stayed pending the disposal of an appeal, the following factors should be considered:

(a) whether the applicant can show special circumstances — *Jagdis Singh*, at p 222 (MLJ); at p 58 (CLJ). An applicant can demonstrate special circumstances when his or her appeal to the Court of Appeal will be rendered redundant if proceedings in the High Court are not stayed;

(b) in *Chinese Chamber Realty Pte Ltd and others v Samsung Corp (No 2)* [2003] 4 SLR 313, at para 3, the Singapore High Court considered the balance of convenience (now popularly known as balance of justice), namely a comparison of the existence, nature and extent of prejudice which may be suffered by the parties if proceedings are stayed or otherwise;

(c) if an application to stay proceedings constitutes an abuse of court process, such an application should be refused — *Jagdis Singh*, at p 222 (MLJ); at p 58 (CLJ); and

(d) whether there is an unexplained delay in applying for a stay of proceedings:

(i) the High Court case of *MCAT Gen Sdn Bhd v Celcom (Malaysia) Bhd (Part 2)* [2007] 8 MLJ 107 at p 115; [2007] 10 CLJ 375 at p 383; and

(ii) the Singapore High Court decision in *MCI Worldcom Asia Pte Ltd v Chembell Technology Sdn Bhd* [2003] 4 SLR 748, at para 7.

[24] The defendants' learned counsel, Encik Mohaji bin Selamat, contended that in deciding the defendants' stay application, merits of the following matters should be considered:

(a) the defendants' appeal; and

(b) a pending suit filed by the defendants against the plaintiff in Shah Alam High Court (Shah Alam Suit).

[25] On whether merits of the pending appeal may be considered in deciding whether a stay of proceedings should be granted, the Court of Appeal decided in *Jagdis Singh*, at p 222 (MLJ); at p 59 (CLJ), as follows:

> Of course, we have to look into grounds of judgment of the (judicial commissioner). But this however, should not extend to deciding the pending appeal, as it will be premature at this stage to do so. It is not for the court deciding the application for stay to declare that the grounds of appeal are frivolous or not arguable. This is to avoid a situation where the court be accused of descending into the arena even before the appeal is argued.

[26] Based on *Jagdis Singh*, I should not consider the merits of the defendants' appeal and the Shah Alam Suit. This is especially so when the plaintiff is relying on issue estoppel doctrine to support the plaintiff's striking

out application (the plaintiff contended in its written submission in support of the plaintiff's striking out application that since Nallini Pathmanathan J has resolved certain issues in the plaintiff's favour during the hearing of the plaintiff's summary judgment application, such findings should subsequently bind this court in deciding the plaintiff's striking out application).

[27] In *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, at pp 268–269, the locus classicus on stay of execution pending appeal, the Federal Court decided that merits of the appeal should not be considered in deciding whether to grant a stay of execution or not.

THE DEFENDANTS' STAY APPLICATION SHOULD NOT BE ALLOWED

[28] I am unable to accede to the defendants' stay application due to the following reasons:

(a) if the defendants' stay application is dismissed and if I proceed to hear the plaintiff's striking out application, the defendants can still proceed with the defendants' appeal. The defendants' appeal is not rendered academic even if I do not stay the plaintiff's striking out application. In any event, even if I subsequently decide the plaintiff's striking out application against the defendants ('the striking out decision'):

(i) the striking out decision is not relevant to the defendants' appeal ('the against the summary judgment'); and

(ii) the Court of Appeal is not bound by my decision in deciding the defendants' appeal,

(b) the defendants have not discharged their legal burden in this case to show any special circumstance to justify the defendants' stay application;

(c) there is no prejudice to the defendants if I refuse the defendants' stay application and if I proceed to hear the plaintiff's striking out application. This is because there is already a stay of summary judgment pending the disposal of the counterclaim. Even if I allow the plaintiff's striking out application, the defendants' have a statutory right to appeal to the Court of Appeal against that decision under s 67(1) of the CJA. As contended by the plaintiff's learned counsel, if the striking out decision is made (either in favour of the plaintiff or the defendants) and if there is an appeal to the Court of Appeal against that decision (*second appeal*), parties may save valuable time, effort and costs by applying to the Court of Appeal to hear together the defendants' appeal and the second appeal;

(d) if I stay the hearing of the plaintiff's striking out application, the plaintiff and AmBank will be prejudiced in the following manner:

(i) the plaintiff cannot enjoy the fruits of the summary judgment in view of the stay of summary judgment; and

(ii) the RSLS-A was due on 19 May 2009 but was not redeemed by the first defendant. Accordingly, AmBank had been legally aggrieved since 19 May 2009,

(e) the grounds for summary judgment had already been prepared by Nallini Pathmanathan J. During the hearing of the defendants' stay application, this court inquired on the status of the defendants' appeal. The defendants' learned counsel informed this court that the record of appeal for the defendants' appeal had already been filed and served on the plaintiff's solicitors. Accordingly, an early hearing date of the defendants' appeal can be fixed;

(f) the defendants sought to stay the hearing of an interlocutory application such as the plaintiff's striking out application. Order 32 r 13(2)(a), (b) and (c) of the Rules of Court 2012 ('the RC') provides a timeline for the exchange of affidavits in respect of the hearing of interlocutory applications. RC, in particular O 34, expressly provides for expeditious disposal of cases. Public policy requires, if not demands, an expeditious disposal of civil suits. Civil suits cannot be disposed of expeditiously if interlocutory applications are held up by stay applications. As ruled in *Jagdis Singh*, at p 222 (MLJ); at p 58 (CLJ), applications to merely stay proceedings should be refused. A *fortiori*, based on *Jagdis Singh*, an application to stay hearing of an interlocutory application should be refused; and

(g) the plaintiff's striking out application was filed on 10 April 2014. The defendants' appeal was subsequently lodged on 17 April 2014. The defendants' stay application was only filed on 10 June 2014, a week before the first hearing date of the plaintiff's striking out application on 17 June 2014. Hence, the plaintiff's striking out application could not proceed on 17 June 2014. There is no credible explanation on affidavit evidence why there was a delay in filing the defendants' stay application.

[29] The defendants had contended that if there was no stay of the plaintiff's striking out application, this would adversely affect the Shah Alam Suit. As correctly pointed out by the plaintiff's learned counsel, the defendants sought to stay the plaintiff's striking out application pending the disposal of the defendants' appeal and not pending the disposal of the Shah Alam Suit. Furthermore, it is clear from Nallini Pathmanathan's grounds for the summary judgment that Her Ladyship has consciously refrained from deciding on the issues raised in the Shah Alam Suit. Likewise, in deciding the defendants' stay application, I have not commented on the merits of the Shah Alam Suit so as to preserve the integrity of that suit.

[30] Due to the above reasons, despite the spirited submission by the defendants' learned counsel, I have to decline the defendants' stay application with costs.

Defendants' stay application dismissed with costs.

Reported by Kanesh Sundrum